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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1137

EARL LATSHA LUMBER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 15-16) is reported at 368 F.2d 216. The findings of fact, conclusions of law and order of the Board (J.A. 2a-28a)[1] are reported at 154 NLRB 429.

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[1] "J.A." refers to the Joint Appendix filed in the court below.

JURISDICTION

The decree of the court of appeals was entered on December 21, 1966 (Pet. 17). The petition for a writ of certiorari was filed on March 10, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's findings that petitioner threatened and interrogated its employees and discharged six of them because of their union activities, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act.

2. Whether, in the circumstances of this case, the Board denied petitioner due process of law by refusing to hear oral argument.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at pages 19-21 of the petition.

STATEMENT

A. The Board's Findings of Fact

On September 13, 1964,[2] Willis Weaver, who had been employed 10 years in petitioner's lumber yard

[2] All dates are in 1964.

business, discussed organizing petitioner's 30 employees with an officer of the Union[3] (J.A. 8a; 58a, 63a-64a, 159a, 163a). Weaver obtained blank union authorization cards, signed one himself, and took the remainder to work with him on the following day (J.A. 8a; 64a). There he signed up Elwood Dietz, who had been employed by petitioner for about 3 years (J.A. 8a; 56a). Dietz in turn agreed to help organize the other employees and by September 16 had obtained 6 more signed union cards; all but one were signed in petitioner's lumber yard (J.A. 8a; 56a-57a, 64a).

On the morning of September 17, petitioner's president, Earl Latsha, assembled about 25 employees in the office as they arrived for work and delivered a speech (J.A. 8a-9a; 57a-58a, 70a, 80a-81a, 90a-91a). Latsha first asserted that petitioner had to begin paying the employees time and a half for overtime,[4] that he did not intend to borrow money to pay the customary bonuses, and that the employees would be harmed by the overtime pay requirement (J.A. 8a-9a; 58a, 71a, 82a, 91a). Latsha then proceeded to the "union subject", stating that he had heard rumors

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[3] Local 776, International Brotherhood of Teamsters, Chauffers, Warehousemen, and Helpers of America.

[4] About the beginning of September, an auditor from the Wage and Hour Division of the Department of Labor began an inspection of petitioner's records to determine petitioner's liability for overtime pay under the Fair Labor Standards Act. Though the auditor advised Latsha not to commence such payments until the audit was completed (about two months later), Latsha decided shortly before the September 17 meeting to begin immediately. (J.A. 17a; 100a, 111a-112a.)

that someone was trying to unionize the lumber yard and that he would not tolerate it. Latsha added that he had enough money to live on without operating the yard and would close it down before permitting a union to come in. (J.A. 8a-10a; 58a, 71a, 82a, 91a.) Latsha singled out Elwood Dietz as the "S. B. who started this thing" (J.A. 71a; 9a) and directed him to punch out. When Dietz asked why he was being fired, Latsha replied that Dietz would get a reason later. (J.A. 9a; 58a, 71a, 82a, 91a, 98a.) Latsha added that he could run the Company with four men if necessary (J.A. 9a-10a; 71a).

After the meeting, Dietz again asked Latsha why he was being discharged. Latsha replied that Dietz was "one of the instigators of this thing" and added, "there's another one too," as he pulled the time cards of Dietz and of a second employee. Latsha said they could get their checks whenever the office girls came in (J.A. 10a; 59a-60a). Before Dietz left the office, Latsha asked him for the names of all employees who had signed union cards but Dietz refused (J.A. 10a; 60a).

Within hours of Dietz's discharge, Latsha also interrogated and discharged five of the six remaining union adherents[5] under the following circumstances.

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[5] As indicated *supra*, p. 3, a total of eight employees signed union cards between September 13 and 16. Six (including Elwood Dietz) were discharged on September 17, the seventh repudiated his designation on the morning of the meeting, and the eighth was interrogated about two days after the meeting but was not discharged (J.A. 15a-16a; 147a, 149a).

Donald Reichenbach, who had worked more than two years for petitioner as a yardman and had signed a union card on September 14, was summoned to the office. There he was told by Earl Latsha's brother, Lee, that Earl had instructed him to obtain his time card and punch out. (J.A. 11a; 79a, 83a.) Minutes later Earl Latsha returned to the office and asked Reichenbach whether he knew who had signed union cards and whether he had signed one. Reichenbach replied that he did not know of others but that he had signed one. Whereupon Latsha said, "OK, get your time card, go up and get your check; you are done." (J.A. 11a; 83a-84a.)

Owen Gephart was a truckdriver who had worked five years for petitioner and had signed a union card on September 14 (J.A. 11a; 69a-70a). Immediately after the September 17 meeting, he made a delivery, and, upon his return to the office, was told by Earl Latsha, "You are fired; punch your time card" (J.A. 11a-12a; 72a). Latsha then repeatedly asked Gephart whether he had signed a union card but Gephart denied it. Latsha also asked Gephart which of the other employees had signed cards but Gephart said he did not know. Finally, when Latsha told Gephart that he had learned from Gephart's wife that Gephart had signed a card, the latter admitted he had (J.A. 12a; 72a-73a). Outside in the yard, Latsha again unsuccessfully asked Gephart who else had signed union cards. He also asked why Gephart had tried "to get a union in for anyhow" and told Gephart he "was one of my best men * * *; I can't under-

stand why you would go and do something like [that]." (J.A. 12a-13a; 74a.) Lee Latsha tried to secure Gephart's reemployment but Earl refused (J.A. 13a; 75a-76a).

Clair Swartz had worked eight years as a lift operator for the Company and had signed a union card on September 14 or 15 (J.A. 13a; 88a-89a). About 45 minutes after the meeting, Earl Latsha approached Swartz in the warehouse and asked if he had signed a union card. When Swartz admitted his signing, Latsha said, "All right, shut the lift off, go down and get your check." (J.A. 14a; 91a-92a.)

Bright Dietz had worked for the Company about nine months and had signed a union card on September 16 (J.A. 14a; 96a-97a). About two hours after his speech, Earl Latsha approached Bright Dietz at the latter's work station and asked Dietz if he had signed a union card. When Dietz acknowledged his signing, Latsha said, "You're done * * *." (J.A. 14a; 98a). Truckdriver John Perry, who was present, asked Latsha if he would keep Dietz since Dietz was a good worker. Latsha replied that Dietz "would have to go now." Dietz was rehired within a week. (J.A. 14a-15a; 98a-99a.)

Willis Weaver, as indicated (*supra*, pp. 2-3), had worked ten years for the Company and had initiated the union organizational campaign. After the meeting, Latsha directed someone behind the counter in the office to "[p]ull Weaver's card; he's going too; he's one of the main leaders" (J.A. 12a; 73a). Shortly thereafter, two employees informed Weaver, who

was at home because of illness, that Earl Latsha had discharged him. Later in the day, the Company office clerk brought Weaver his check and a letter from the Company which simply stated, "We no longer need your services." (J.A. 15a; 65a.)

Petitioner's president, Earl Latsha, testified at the hearing that the discharges were economically necessary because of overtime pay requirements (*supra*, p. 3, n. 4), and that the foregoing employees were selected for discharge for such reasons as inefficiency, customer complaints, refusal to work on Saturdays, and jobs on the side (J.A. 16a-19a; 100a-105a).[6] However, the dischargees had never been individually warned about poor work performance, and Earl Latsha did not consult with any other management representative or supervisor before terminating them (J.A. 17a, 18a; 124a).

B. The Decisions of the Board and of the Court of Appeals

Upon the foregoing facts, the Board found that petitioner had violated Section 8(a)(1) of the Act by threatening to close its lumber yard if the employees chose to unionize, by discharging Elwood Dietz in the presence of other employees because of his union activities, and by coercively interrogating employees about their signing of union cards (J.A. 21a, 23a-24a). The Board further found that petitioner had violated Section 8(a)(3) and (1) of the Act by dis-

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[6] Latsha assigned no particular reason for the discharge of Bright Dietz (J.A. 19a).

charging the six employees discussed above for their union activities (J.A. 20a-21a, 23a). The Board's order directed petitioner to cease and desist from the unfair labor practices found, to reinstate those discriminated against with back pay,[7] and to post appropriate notices (J.A. 3a-4a, 24a-26a).

The court of appeals found that "substantial evidence which the Board was entitled to, and did, credit supports the [Board's] findings," and it therefore enforced the Board's order (Pet. 16).

ARGUMENT

1. Petitioner's attack (Pet. 9-14) upon the credibility of the employee witnesses and the sufficiency of the evidence supporting the violations found by the Board merely raises a substantial evidence question, which does not warrant further review by this Court. See *National Labor Relations Board* v. *Pittsburgh Steamship Company*, 340 U.S. 498, 502-503. In any event, the facts summarized in the statement clearly demonstrate, as the court below held (Pet. 16), the propriety of the Board's findings that petitioner threatened, coercively interrogated, and discharged six employees for engaging in union activities, in violation of Section 8(a)(1) and (3) of the Act.

2. Nor did the Board abridge petitioner's constitutional right to a fair hearing by refusing to hear oral

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[7] Since petitioner had retired Bright Dietz, the Board's order as to him required only reimbursement for loss of pay resulting from his discriminatory discharge (J.A. 22a, 25a).

argument (Pet. 6-9).[8] As this Court has held, "The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights." *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 351. In proceedings like the one involved here, "Argument may be oral or written." *Morgan* v. *United States*, 298 U.S. 468, 481; accord, *Federal Communications Commission* v. *WJR*, 337 U.S. 265, 281-284. Petitioner had a full hearing before the Trial Examiner, including oral argument (J.A. 6a; Pet. 8), and thereafter presented written exceptions and a brief to the Board (J.A. 34a-40a). The Board, in turn, considered the entire record, including petitioner's exceptions and brief, and found that the "issues and positions of the parties" were "adequately present[ed]" (J.A. 3a). Under these circumstances, as the court below held (Pet. 16), the Board was not constitutionally required to also hear oral argument. See *National Labor Relations Board* v. *Clausen*, 188 F. 2d 439, 444 (C.A. 3), certiorari denied, 342 U.S. 868; *National Labor Relations Board* v. *Allied Distributing Corp.*, 297 F. 2d 679 (C.A. 10).[9]

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[8] Section 10(c) of the Act provides that after the testimony taken by the Trial Examiner is filed with the Board, "in its discretion, the Board upon notice may take further testimony or hear argument."

[9] And as court stated in the last cited case above (297 F. 2d at 680-681): "*Londoner* v. *Denver*, 210 U.S. 373 [upon which petitioner relies, see Pet. 6], is not in point. That case involved tax assessment proceedings in which the objectors were not given an opportunity to be heard other than by the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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submission of their objections in writing and there was no right of court review. In the instant case there was a full hearing before the examiner, review of his report by the Board upon exceptions and briefs, and * * * enforcement proceedings in [the] court [of appeals]."

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